

DATE: November 25, 2019

In Re:)	
[REDACTED])	Claims Case No. 2019-WV-042502.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, when a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

DECISION

A member of the U.S. Marine Corps (USMC) requests reconsideration of the September 3, 2019, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019- WV-042502.

Background

The record shows that the member, a Staff Noncommissioned Officer (SNCO), was stationed in Florida receiving basic allowance for housing at the dependent rate (BAH-D) on behalf of his dependent son who resided with him. The member received unaccompanied permanent change of station (PCS) orders to California. On March 30, 2016, the member reported to his new duty station in California and checked into the Bachelor Enlisted Quarters (BEQ). As a result of his unaccompanied PCS orders, his son went to live with his former spouse, the child's mother, in New York. Because the member's son no longer resided with him, he was no longer entitled to receive BAH-D. However, due to an administrative error, the member erroneously received BAH-D at his new duty station from March 30, 2016, through April 15, 2018, causing an overpayment of \$31,395.60. The overpayment was discovered by the member's Installation Personnel Administration Center (IPAC) in April 2018. During the period of the overpayment, the IPAC determined the member was entitled to receive BAH at the

differential rate (BAH- DIFF) in the amount of \$7,483.90,¹ and that amount was applied to the overpayment, reducing it to \$23,911.70.

On May 1, 2018, the member requested that his debt be remitted by the Service Secretary, the Secretary of the Navy. In his remission request, the member detailed his family health issues, his arduous duty assignment that separated him from his family and the financial hardship repaying the debt would cause him. He also acknowledged that when he checked into his duty station in California, he knew he was only entitled to receive BAH-Diff. He accepted that he had a level of responsibility with regard to paying attention to his pay. Instead of processing the member's remission request, his Command recommended that the member pursue waiver of his debt under the authority of 10 U.S.C. § 2774. On July 2, 2018, his Commanding Officer initially recommended to the Defense Finance and Accounting Service (DFAS) partial waiver of the member's debt in the amount of \$9,000.00. His recommendation for partial waiver was based on the fact that the erroneous payment appeared to be caused by administrative error; however, he noted that the member also had a responsibility to review his leave and earnings statements (LES) and bring any discrepancies to the Command's attention. On August 8, 2018, the member submitted another statement in support of his request to relieve him of the indebtedness. In his statement, he acknowledged his responsibility to report any errors regarding his pay and allowances. However, he did not notice the discrepancy because of his high involvement with exercise forces, daily duties and his additional family challenges. On September 12, 2019, his Commanding Officer changed his recommendation to waive the debt in part from \$9,000.00 to \$14,911.73. On October 4, 2018, the member's Disbursing Officer recommended to DFAS full waiver of the member's debt.

In the recommendation and administrative report to DOHA dated April 5, 2019, concerning the member's request for waiver under 10 U.S.C. § 2774, DFAS stated that the member was expecting to receive BAH-Diff, he did not review his LES and he did not report the erroneous BAH-D payments to the appropriate authorities, which statutorily precluded waiver of the erroneous payment. However, DFAS then recommended partial waiver of the debt in the amount of \$12,025.00, which DFAS advised represented the amount of child support the member paid to his former spouse during the period of indebtedness.

The DOHA adjudicator disagreed with DFAS's recommendation of partial waiver of the debt. She noted, as DFAS did, that the member acknowledged that he knew he was only entitled to receive BAH-Diff when he arrived at his new duty station in California. He also acknowledged receiving LES during the period of overpayment and his responsibility to review his pay statements. The DOHA adjudicator then concluded that under the circumstances, waiver was statutorily precluded. However, she did note that while waiver of the overpayment was not appropriate under 10 U.S.C. § 2774, this did not preclude the member from pursuing the matter as a remission.

In his reconsideration request, the member submits his Command's endorsement to DFAS of a partial waiver. The documentation provided by the member shows his Command conducted an investigation into the matter. The Command found that the erroneous payments

¹The member was entitled to receive BAH-Diff as a result of paying child support pursuant to a 2009 divorce decree.

were caused by administrative error and there was no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member.

Discussion

Under 10 U.S.C. § 2774, we have authority to waive collection of erroneous overpayments of pay and allowances to a member of the uniformed services if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See* Department of Defense Instruction 1340.23 (hereinafter Instruction), *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, ¶ E4.1.2 (February 14, 2006). In the present case, the erroneous payments were made as a result of administrative error and there is no indication of fraud, misrepresentation, or lack of good faith on the part of the member. However, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not a sufficient basis in and of itself for granting waiver. *See* Instruction ¶ E4.1.3.

A member is considered to be partially at fault, and waiver is precluded, if in light of all the circumstances, it is determined that he should have known that he was being overpaid. The legal definition of “fault” in waiver determinations does not imply any ethical lapse on the part of the member. It merely indicates that the member is not entirely without responsibility for any resulting overpayment, and that, therefore, the equitable remedy is not available to him. Thus, if a member is furnished with documentary records or information which, if reviewed, would cause a reasonably prudent person of the same rank and experience to be aware of or suspect the existence of an error, but the member fails to review the documents carefully or otherwise fails to take corrective action, the member is not without fault and waiver is precluded. *See* DOHA Claims Case No. 2012-WV-070303.2 (November 20, 2012); and DOHA Claims Case No. 08121001 (December 23, 2008).

In this case, the member was a SNCO assigned to a stateside command, who failed to check his LES for two years. We appreciate the fact that the member’s Command had a high operational tempo, that he was working long hours without taking leave, all the while dealing with the separation from his family and the ability to deal directly with their health issues, giving him no time to check his LES. However, our authority is limited by the waiver statute, 10 U.S.C. § 2774, the standards for waiver and case precedent. We have consistently held that when a member is aware or reasonably should be aware that he is receiving pay in excess of his proper entitlement, he has a duty to retain such amounts for subsequent refund to the government, and to make inquiry to the appropriate official. Additionally, we cannot stress too highly the importance of careful review by each member of the LES provided by the agency. Since LES are issued to members in order that they can verify the accuracy of their pay, we have consistently held that a member who receives an LES has a duty to carefully examine them and report any error. Here, the member knew he was only entitled to receive BAH-Diff, and he was in receipt of LES and had a duty to check his entitlements reflected on them, particularly after checking into a new duty station. Therefore, under the circumstances, we find the member was not without fault in the matter, which statutorily precludes waiver. *See* DOHA Claims Case No.

2016-WV-030807.2 (January 30, 2017); and DOHA Claims Case No. 2015-WV-050101.2 (August 26, 2015).

As for DFAS's administrative report recommending partial waiver of the debt based on the member's payment of child support, we have consistently held that when waiver is statutorily precluded under 10 U.S.C. § 2774, no portion of the debt may be waived. *See* DOHA Claims Case No. 2016-WV-032402.4 (December 8, 2016). DFAS correctly noted that waiver was statutorily precluded in the member's case but then recommended partial waiver. In order for partial waiver to have been appropriate for the amount of child support the member paid, he must have been without fault under the waiver statute. Having found fault on the part of the member, there is no basis for apportioning it under the waiver statute. *See* DOHA Claims Case No. 2016-WV-110410.2 (January 23, 2017); DOHA Claims Case NO. 2012-WV-070303.2, *supra*; and DOHA Claims Case No. 08121001, *supra*.

As for the member's argument that his debt should be waived because his command recommended it be partially granted, our decisions are based upon the underlying factual circumstances applying the pertinent waiver statute, regulation and applicable precedents. We have reviewed the record *de novo* and our decision in this case, like all our decisions, is made independently of the arguments or recommendations of the agency. *See* DOHA Claims Case No. 2017-WV-030703.2 (July 31, 2017).

We note that on May 1, 2018, the member initially sought remission of his debt under the authority of 10 U.S.C. § 8271,² and submitted a NAVMC 11082, *Financial Statement – Remission of Indebtedness*, to the Secretary of the Navy. Remission of an indebtedness is a separate remedy from waiver of an erroneous payment under 10 U.S.C. § 2774. Under 10 U.S.C. § 8271, in deciding whether a debt incurred on active duty should be remitted, the Secretary of the Navy has much broader discretion over whether or not the member's debt should be collected in full or in part. Under the remission statute, the Secretary of the Navy may consider the member's financial situation and the hardships imposed on him with his PCS. Finally, as expressed by the DOHA adjudicator in her decision, the denial of a waiver under 10 U.S.C. § 2774 does not preclude a member from applying for the remission or cancellation of the debt.

²The remission statute for cancellation of indebtedness for members of the U.S. Navy and USMC was previously codified under 10 U.S.C. § 6161. However, it was renumbered under 10 U.S.C. 8271 effective February 1, 2019, by Pub. L. 115-232, Div. A, Title VIII, § 807(b)(1), August 13, 2018, 132 Stat. 1835.

Conclusion

The request for reconsideration is denied, and we affirm the decision, dated September 3, 2019. In accordance with Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board